

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL CARDIOLA LOPEZ,

Defendant and Appellant.

D053543

(Super. Ct. No. SCE272425)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

Daniel Cardiola Lopez appeals a judgment following his jury conviction of two counts of murder (Pen. Code, § 187, subd. (a)),¹ two counts of vehicular manslaughter (§ 192, subd. (c)(1)), and one count of assault with a deadly weapon (§ 245, subd. (a)(1)). On appeal, Lopez contends his constitutional right to due process of law was violated

¹ All statutory references are to the Penal Code.

because the evidence is insufficient to support his conviction for assault with a deadly weapon.²

FACTUAL AND PROCEDURAL BACKGROUND

On June 26, 2007, a team of six United States Border Patrol agents, assigned to the plainclothes Combined Operational Border Response Assets (COBRA) unit, were operating along Highway S-2 between Ocotillo and Highway 78. One agent was positioned at mile marker 51 when he saw a red Dodge pickup truck with a camper shell pass by him, heading north. He saw a person lying down in the extra cab portion and other people crouched down inside the camper shell. The agent communicated this information by radio to other agents located north of him.

Another agent began following the red pickup truck. The truck pulled over onto the highway shoulder and stopped. The agent stopped his car behind the truck and activated his car's emergency lights. As the agent stepped out of his car, the truck drove away. The agent activated his car's siren and pursued the truck. The pickup truck straddled the north- and southbound lanes as it headed north. Another agent activated his car's emergency lights and siren and joined the pursuit of the pickup truck.

Agent David Hubal was driving north at about mile marker 48 when the red pickup truck passed his marked Border Patrol van and swerved in front of him. Agent Oscar Joanicot was standing on the east side of the road at mile marker 47, waiting to deploy a controlled tire deflation device (CTDD), or "spike strip." As the red pickup

² Lopez does not challenge his convictions of the other four offenses.

truck approached Joanicot's position, it accelerated and straddled the north- and southbound lanes. The truck twice swerved toward Joanicot, first when it was about 50 to 70 yards away and again when it was about 15 to 20 feet away. As the truck swerved the second time, Joanicot, fearing for his life, deployed the CTDD, ran from the road and dove behind a berm. The truck then braked and drove around the CTDD.

Supervisory Agent John Ramos was positioned at mile marker 45, waiting to deploy another CTDD. However, observing the truck's erratic driving, Ramos chose not to deploy the CTDD and ordered the other agents to disengage from the pursuit of the truck. Two to three minutes later, the agents saw "a big ball of fire and a cloud of black smoke" off in the distance at about mile marker 42. The red pickup truck had collided with a Toyota Corolla travelling south on Highway S-2.

The agents responded to the accident and assisted those persons injured in the collision. Lopez and another man were kneeling near the burning truck, apparently trying to stand up. They started to run away. One agent shouted "stop" in Spanish. He caught the first man about 100 yards away and then caught Lopez about 300 to 400 yards away. He escorted the men back to the vehicles at gunpoint. Another agent saw some of the truck's passengers sitting in the desert. They looked at Lopez and said, "We told you [to] stop. All you had to do was stop. Look what happened now. We told you. All you had to do was stop." The agent then contacted Lopez and asked him whether he was driving the truck. Lopez replied: "Hey, what's done is done. There's nothing I could do about it now. What do you want me to do? I did it. I did it. Yes, I was driving. Stuff happens." Two the truck's passengers died as a result of injuries sustained in the collision.

An amended information charged Lopez with the five offenses described above.³ At trial, Joanicot, Hubal, and the other four agents testified regarding the incident. An accident reconstructionist expert testified for the prosecution. In Lopez's defense, a different accident reconstructionist expert testified. Lopez did not testify.

The jury found Lopez guilty of the charged offenses, including assault with a deadly weapon (§ 245, subd. (a)(1)). The trial court sentenced Lopez to two consecutive terms of 15 years to life in prison for the murder convictions and a consecutive three-year term for the assault with a deadly weapon conviction.⁴ Lopez timely filed a notice of appeal.

DISCUSSION

I

Substantial Evidence Standard of Review

The due process clauses of the federal and state Constitutions prohibit a criminal conviction unless a defendant's guilt is proven beyond a reasonable doubt by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-318; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on

³ Although the amended information charged Lopez with violation of section 245, subdivision (a)(1), for assault by means likely to produce great bodily injury, the prosecution's trial theory, jury instructions, and verdict based that section 245, subdivision (a)(1), offense on assault with a deadly weapon. For purposes of this opinion, we assume the information was subsequently amended to conform to the evidence presented at trial.

⁴ The trial court stayed imposition of sentencing on the two vehicular manslaughter convictions pursuant to section 654.

another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) On appeal, the court must determine whether substantial evidence supports the conclusion of the trier of fact and not whether the evidence proves the defendant's guilt beyond a reasonable doubt. (*Johnson*, at p. 576; *People v. Reilly* (1970) 3 Cal.3d 421, 425.) "The [substantial evidence] standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

II

Substantial Evidence to Support Lopez's Assault Conviction

Lopez contends his constitutional right to due process of law was violated because the evidence is insufficient to support his conviction for assault with a deadly weapon.

A

Section 245, subdivision (a)(1), provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years" Section 240 defines

an "assault" as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

In this case, the trial court instructed the jury with a modified version of CALCRIM No. 875:

"The defendant is charged in Count 5 with assault with a deadly weapon in violation of Penal Code section 245.

"To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon to a person.

"Someone commits an act *willfully* when he does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"The term *application of force* and *applied force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"The People are not required to prove that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact along with all of the other evidence in deciding whether the defendant committed an assault, and if so, what kind of assault it was.

"A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous, or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

"[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that battery might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 788, fn. omitted.) Alternatively stated, "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) *Williams* explained: "For example, a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.)

In *People v. Wright* (2002) 100 Cal.App.4th 703, the court stated: "[A]ny operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon." (*Id.* at p. 706.) Accordingly, *Wright* affirmed the defendant's conviction of two counts of assault with a deadly weapon where the defendant had driven

his vehicle close to his victims while trying to frighten them. (*Id.* at pp. 705, 707-709, 724-725.)

B

At trial, Joanicot, the alleged victim of the assault charge, testified regarding the incident. As Joanicot was standing east of the road's shoulder and preparing to deploy the CTDD, the red pickup truck swerved toward him twice as it headed north. It first swerved at him about 50 to 70 yards away. The second time the truck swerved at him when it was "very close," within 15 to 20 feet from him. When the truck swerved at him, it "was more facing me [Joanicot] than facing straight up the road." When the truck swerved toward him the second time, Joanicot feared for his life and was afraid it was going to run him down. He threw out the CTDD, turned and ran from the road, and "kind of semi-dove over [a little] berm to get out of the way." Joanicot could not recall whether the truck was within the northbound lane or had left the roadway when it swerved toward him. Nevertheless, Joanicot testified the truck was pointed "more northeast," instead of heading straight on the road.

Hubal testified that after the red pickup truck passed his van going north, it began straddling the north- and southbound lanes. Within about 10 to 15 seconds, he saw the truck approach Joanicot's position. When Hubal was about 100 to 150 hundred yards behind the truck, Hubal saw the truck swerve into the northbound lane "almost to the shoulder of the road, right at Agent Joanicot's position." The truck came "right at" and was "really close" to Joanicot. Joanicot was standing on the dirt shoulder of the road, close to the road. Hubal did not believe the truck drove onto the shoulder. When the

truck swerved at Joanicot, Hubal saw him "run off into the desert to the east of the road, behind some bushes." Hubal then saw the truck's brake lights come on and saw the truck go into the southbound lane and around the CTDD. The CTDD was positioned only in the northbound lane at the time. The truck then continued traveling north.

C

Based on our review of the whole record, including the testimonies of Joanicot and Hubal, we conclude there is substantial evidence to support Lopez's conviction of assault with a deadly weapon. The jury could reasonably infer from the evidence that Lopez willfully swerved his truck toward Joanicot. Furthermore, the jury could reasonably conclude that when Lopez swerved his truck toward Joanicot, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to Joanicot. Although the record does not show exactly how close the truck came to Joanicot when it swerved at him the second time, the jury could reasonably infer it came so close that a reasonable person would realize the act's nature would directly and probably result in the application of force to Joanicot. Both Joanicot and Hubal testified the truck came "very" or "really" close to Joanicot. Also, based on Joanicot's reaction of running away as the truck swerved toward him, the jury could infer the truck was very close to him and a reasonable person would realize it would directly and probably hit Joanicot. Finally, the jury could reasonably conclude that when Lopez acted, he had the present ability to apply force with a deadly weapon (i.e., his truck) to Joanicot.

Although Lopez argues the evidence shows only that he was weaving his truck to avoid hitting the CTDD and did not intend to run over or frighten Joanicot, Lopez's subjective intent in swerving his truck toward Joanicot is irrelevant to the objective determination of whether a reasonable person would realize that the act by its nature would directly and probably result in the application of force to Joanicot. (*People v. Williams, supra*, 26 Cal.4th at pp. 788, 790.) Similarly, even if Lopez swerved his truck at Joanicot in an attempt to deter him from deploying the CTDD, that subjective intent is likewise irrelevant to the jury's application of the objective reasonable person standard in determining whether Lopez was guilty of assault with a deadly weapon. (*Ibid.*) Accordingly, we conclude Lopez has not carried his burden on appeal to persuade us that the evidence is insufficient to support his conviction of assault with a deadly weapon.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.